

# TRIPS: With a Painful Birth, Uncertain Health, and a Host of Issues in China, Where Lies Its Future?\*

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\* J.D. candidate 2006, University of San Diego School of Law; M.S. 1996, University of California, Irvine; B.S. 1990, University of Toronto. The author would like to thank Professor Lisa Ramsey and Naveen Gurudevan for offering valuable guidance and encouragement. The comment is dedicated to his parents, Ben and Violet, and to his wife, Valerie, for their encouragement and love.

## I. INTRODUCTION

In recent decades, the United States and other western nations have used pragmatic and theoretical reasons to justify a strong, global intellectual property ("IP") regime. From a practical perspective, economically mature nations clearly have a direct, vested interest in preventing the piracy of patented goods and ensuring that their domestic agendas maximize financial protection for inventions or creations.<sup>1</sup> Nevertheless, the supranational disregard of patent protection and IP piracy has a financial impact on numerous companies, as well as the taxpaying citizens, in developed countries.<sup>2</sup>

The existence of philosophical differences between the traditional European and American foundations for domestic IP rights leave the rationale for recent international IP agreements somewhat hazy.<sup>3</sup> Domestically, the United States has espoused the utilitarian theory in enacting legislation granting various intellectual property rights. Utilitarian theory posits that providing incentives for the creation of goods serves the best interests of the nation, as it yields new products and ideas that will ultimately maximize the citizens' welfare.<sup>4</sup> By contrast, European nations tend to justify intellectual property rights on the basis of John Locke's theory of natural rights, which holds that creators have a moral right to the product of their labor.<sup>5</sup>

These disparate foundations for basic IP rights result in a haphazard theoretical grounding to the Agreement on Trade-Related Intellectual Property Rights ("TRIPS"),<sup>6</sup> the most prominent international IP accord.<sup>7</sup> While the intentions, and indeed many of the results, of the

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1. BANKOLE SODIPO, *PIRACY AND COUNTERFEITING, GATT, TRIPS AND DEVELOPING COUNTRIES* 121 (J.J. Norton ed., 1997).

2. Lee Petherbridge, Comment, *Intelligent TRIPS Implementation: A Strategy for Countries on the Cusp of Development*, 22 U. PA. J. INT'L ECON. L. 1029, 1036 (2001); Ruth Gana Okediji, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEG. STUD. 117, 121 (1999).

3. See generally A. Samuel Oddi, *TRIPS—Natural Rights and a "Polite Form of Imperialism"*, 29 VAND. J. TRANSNAT'L L. 415 (1996) (arguing that international IP treaties appear to be based on a form of natural rights, rather than utilitarian theory).

4. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 2, 10-13 (3d ed. 2003).

5. *Id.* at 2-3.

6. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

7. See J.H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 370 (1996) [hereinafter Reichman,

international IP protection regime under TRIPS have been positive, real world economic concerns indicate the existence of moral dilemmas that are yet to be resolved. International IP protection laws provide powerful leverage in trade talks; though geared towards stimulating creativity,<sup>8</sup> they also firmly protect the economic hegemony of the most developed nations, perhaps at the expense of individual welfare—particularly healthcare—in under-developed countries.

TRIPS is a powerful, comprehensive agreement, representing a positive step for most trading nations. However, the agreement is haunted by the bitter acrimony that surrounded its creation, the ongoing welfare issues alluded to above, and a future that risks being derailed by an increasingly important trading nation, China, which enjoys all the associated trade benefits of TRIPS but does not endeavor to faithfully enforce IP regulations.

Part II of the paper describes the highly significant, yet often overlooked, role of TRIPS' history in engendering animosity amongst many less-developed nations. The strong-arm tactics of the developed world resulted in the migration of primary international patent protection regime from the auspices of the Paris Convention for the Protection of Industrial Property ("Paris Convention")<sup>9</sup> to TRIPS, in the face of substantial resistance from the least-developed countries.

Some of the critical structural aspects of TRIPS are examined in Part II. Features included in TRIPS at the behest of developed nations often appear to limit the self-determination of developing countries, and in some instances, harm the welfare of the citizens of poorer countries, at least in the short-term. Vague and often hotly contested accommodations exist within TRIPS for the benefit of less developed nations in the event of a health crisis. Greater clarity and certainty is required with respect to this critical area of the agreement.

Part III considers the dynamics of the growing and maturing economy in China, the world's second largest economic power.<sup>10</sup> China presents a

*Compliance*] (arguing that TRIPS is not based on any "solid theoretical or empirical foundations whatsoever").

8. Robert Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 492 (1997).

9. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *last revised at* Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter *Paris Convention*], *available at* [http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf) (last visited Jan. 9, 2006).

10. China's economic output is second largest behind that of the United States on the basis of purchasing power parity. In spite of this, it is significant to note that it ranks

fascinating case study with respect to the dilemmas inherent in international IP law. China simultaneously demonstrates qualities of developed *and* developing countries. The tensions displayed in the response of the Chinese government and administrative agencies to international IP obligations imposed by TRIPS highlights the nontrivial problems experienced by the pharmaceutical industries and ordinary citizens of developing nations when such nations are forced to alter their traditional business and social models to conform to the globally harmonized patent system. Simultaneously, China's practice of exerting only minimal efforts to enforce IP laws has, in a sense, been legitimized by its inclusion in TRIPS, making a mockery of the painful sacrifices made by other nations in complying with the treaty.

Lastly, Part IV proposes some modifications to the current international IP regime. The proposals aim to establish a functioning IP regime that rewards creativity, while simultaneously providing greater protection for individuals' social and economic welfare, and not merely through perceived benefits of "trickle-down" economics.<sup>11</sup> With a few modest alterations to TRIPS, these goals can be realized. Naturally, difficult concessions would be required from all parties for this to be feasible. The role of built-in review processes and the mechanisms by which TRIPS can be modified are of critical importance. Additionally, the idea of increased corporate responsibility and governance may be a wild-card factor in the implementation of TRIPS in less-developed countries.

## II. TRIPS FROM PARIS

### A. *The Demise of the Paris Convention*

The United States is viewed by developing nations as the dominant architect behind the establishment of the current intellectual property protection regime, and history supports this interpretation.<sup>12</sup> The United States did not always push aggressively for IP protection. Prior to the 1980s, trade and IP regulations operated independently of each other.<sup>13</sup> In general, the increasing importance of free-trade to the economic

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far lower on a per capita basis. CIA, THE WORLD FACTBOOK 2005 116 (2005), available at <http://www.cia.gov/cia/publications/factbook/>.

11. William Greider, *The Continuing Education of David Stockman*, ATLANTIC, Dec. 1981, at 47 (using the term "trickle down" to describe Reagan's supply side economic policy, which aimed to directly benefit the highest earners via tax cuts, indirectly stimulating the entire economy) (available from author).

12. Petherbridge, *supra* note 2, at 1029-30.

13. R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 226-26 (1989).

growth of developed countries' economies has prompted increased international protection of patents and other forms of intellectual property.<sup>14</sup>

International intellectual property treatment began in earnest well over a hundred years ago, with the drafting of the Paris Convention<sup>15</sup> in 1883. Along with the Berne Convention for the Protection of Literary and Artistic Works of 1886,<sup>16</sup> the agreements were characterized by the "unions" of nations that abided by them.<sup>17</sup> In 1967, those early conventions came under the administrative control of the World Intellectual Property Organization ("WIPO"), a specialized United Nations-operated agency.<sup>18</sup>

The Paris Convention established nominal protection for patents and trademarks by mandating equal "national treatment,"<sup>19</sup> regardless of the origin of the intellectual property, as well as the "right of priority."<sup>20</sup> At the time of its adoption, the Paris Convention successfully fended off a tide of anti-patent sentiment, much of which came from Germany.<sup>21</sup> Interestingly, in that era the U.S. displayed little enthusiasm towards patents.<sup>22</sup> Private ownership and the rights associated with patents were

14. See Randy L. Campbell, *Global Patent Law Harmonization: Benefits and Implementation*, 13 IND. INT'L & COMP. L. REV. 605, 617 (2003) (noting importance of international patent protection due to the elevated proportion of international trade in IP, the increased interdependence of commerce, and problems associated with piracy of IP); Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 393-94 (1996) [hereinafter Otten & Wager] (contemplating the growing importance of international IP rights to the international trading system).

15. Paris Convention, *supra* note 9.

16. The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention], available at [http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) (last visited Jan. 9, 2006).

17. GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY 44 (2001).

18. World Intellectual Property Organization, *opened for signature* July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3 [hereinafter WIPO]; WIPO was formed in 1967, prior to which "BIRPI", the Bureaux for the Protection of Intellectual Property, was the primary intergovernmental body concerned with intellectual property. See DINWOODIE, *supra* note 17, at 44. See also DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 9 (2d ed. 2003).

19. See Paris Convention, *supra* note 9, art. 2(1). "Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all other countries of the Union the advantages that their respective laws now grant . . ."

20. *Id.* arts. 4(A)(1), 4(C)(1).

21. DINWOODIE, *supra* note 17, at 378-79.

22. Sridhya Ragavan, *Can't We All Get Along? The Case for a Workable Patent Model*, 35 ARIZ. ST. L.J. 117, 149 (2003) (Confusion over criteria for patentability predominated, even after the enactment of the Patent Act in 1952. It was not until Congress created the Federal Circuit Court of Appeals with jurisdiction over patent appeals, that public attitudes began to change).

items on the American agenda.<sup>23</sup> However, highly vigorous patent protection was not sought by the United States or any other nation at that time.

The Paris Convention ultimately failed to meet the needs of the modern world due to its overly weak enforcement and resolution powers.<sup>24</sup> For instance, its dispute resolution mechanism relied on voluntary efforts and compliance according to the United Nations Charter, rendering it impotent in the face of serious disagreements.<sup>25</sup> Some argue that the United States bore some responsibility for this impasse by totally abandoning the notion of using any resolution mechanisms involving the International Court of Justice ("I.C.J.").<sup>26</sup> Though moot now, the United States might have been able to build support for I.C.J. reform if they had taken the time to send the I.C.J. a well-publicized test case involving a clear violation of international IP laws.

In contrast to the United States, developing nations generally held favorable opinions with respect to the Paris Convention and the WIPO administration.<sup>27</sup> Much like the United Nations, in the 1970's most parties felt that WIPO was a relatively balanced, honest organization.<sup>28</sup>

Developing nations increasingly used WIPO as a forum to lobby for decreasing existing patent protections, arguing, amongst other things, that IP represented "common heritage" that would be lost to foreign interests.<sup>29</sup> By the mid 1970's, this posture conflicted directly with the United States' re-dedicated determination to strengthen IP protection.<sup>30</sup>

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23. DINWOODIE, *supra* note 17, at 382 (framing the United States' viewpoint in the 1870s that patents represented private property rights, unlike the Austrian practice of treating patent rights more as a matter of public policy based on societal needs).

24. GERVAIS, *supra* note 18, at 1.10.

25. Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPS" Over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 182-83 (1998).

26. Owen Lippert, *One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 241, 271-72 (1998).

27. See Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243, 250 (1989).

28. See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 20 (2003).

29. INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 44 (Anthony D'Amato & Doris Estelle Long eds., 1996).

30. Even though the Constitution unambiguously entrenches intellectual property rights, IP rights have not always been accepted enthusiastically in the United States. See, e.g., Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 19 (2004) [hereinafter Helfer]. See also Gadbar, *supra* note 13 n.10 (listing main reasons for bullish sentiments towards IP protection as the recognition of link between IP protection and trade, globalization due to increased communications capabilities, increased piracy due to technological advances, concerns arising from increased research, and development costs).

Deadlock developed under WIPO's equal vote membership.<sup>31</sup> Developed nations, particularly the United States during the Reagan administration, began to consider other options, including the development of a new forum for IP rights. Many aspects of the transition of forums would prove to be highly acrimonious and divisive, leading to fissures that still exist today.

*B. A New Playing Field: The Advantages of the WTO/GATT  
Forum to Developed Countries*

Some developed nations instigated a new strategy of linking intellectual property rights reform directly to trade policy in order to strengthen their relative positions in the IP world/format arena.<sup>32</sup> The United States and Japan, in particular, sought to bring about a new paradigm in international IP rights.<sup>33</sup>

Special interest groups were extremely important in bringing about the transition to a new forum, with a number of lobbying groups within the United States playing a very influential role.<sup>34</sup> Arguably, the most important group was the Intellectual Property Committee ("IPC"),<sup>35</sup> an American group composed of a dozen corporate executives from the pharmaceutical, computer, and entertainment industries.<sup>36</sup> The IPC played a pivotal role in lobbying U.S. and foreign parties, and in drafting a document that was ultimately brought to the General Agreement on Tariffs and Trade ("GATT")<sup>37</sup> in 1988. The IPC believed that the integration of IP protection with trade issues would be best accomplished in GATT as the primary forum.<sup>38,39</sup>

31. Helfer, *supra* note 30, at 20.

32. See Gadbow, *supra* note 13, at 226.

33. GERVAIS, *supra* note 18, at 1.11.

34. See SELL, *supra* note 28, at 2.

35. *Id.* at 2 n.1. In 1986, the IPC contained members from several pharmaceutical and chemical companies, including ironically, Pfizer, as well as Merck, Bristol-Myers, Johnson & Johnson, DuPont and Monsanto. Computer giants IBM and Hewlett-Packard were represented, as were media companies CBS and General Electric (which was in the midst of purchasing NBC in 1986), as well as General Motors, the world's largest car manufacturer at that time.

36. *Id.*

37. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

38. GATT was formed in 1948 with the goal of increasing trade following World War II and preventing a return of protectionism. SHAHID ALIKHAN & RAGHUNATH MASHELKAR, INTELLECTUAL PROPERTY AND COMPETITIVE STRATEGIES IN THE 21ST CENTURY 41-42 (2004).

The timing was ripe with respect to the adoption of GATT-based IP regulation. In a decade in which conservative administrations took the reins in many western governments,<sup>40</sup> GATT bureaucrats had become all too aware of changing politics, and risked being seen as irrelevant if they expended excessive time dealing with North-South issues.<sup>41,42</sup> When the opportunity to broaden GATT's scope arose amidst a very pro-trade agenda at the Uruguay Round, the response from the GATT Secretariat was predictably favorable.<sup>43</sup>

The linkage of trade and intellectual property issues provided developed nations with the simple, yet effective, enforcement mechanism they sorely lacked under WIPO: the ability to impose tariffs or trade sanctions, within the rules of the organization, as a penalty for IP violations by another member. In the 1970s the United States, had, for example, enacted domestic legislation that provided potentially significant firepower towards nations that did not respect U.S. IP rights. Section 301 of the U.S. Omnibus Trade and Competitiveness Act of 1988 ("Omnibus Trade Act")<sup>44</sup> (frequently referred to as either "Special 301" or "Super 301")<sup>45</sup> and Section

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39. *U.S. Framework Proposal to GATT Concerning Intellectual Property Rights*, 4 INT'L TRADE REP. (BNA) 1371 (1987).

40. See SELL, *supra* note 28, at 19.

41. *Id.* at 20.

42. "North-South" designates the division between "developed" countries, whose mature manufacturing and technology sectors form a significant portion of the economy, and "developing" countries, which are more reliant on manufacturing, as they try to narrow the economic gap with developed countries. See Canada-France-Federal Republic of Germany-Italy-Japan-United Kingdom-United States: London Summit Final Communiqué on North-South Issues, Energy and Economic Cooperation, 16 I.L.M. 724 (1977) for a general outline of issues relating to developing countries.

43. See SELL, *supra* note 28, at 20.

44. See Alejandro Lopez-Velarde, *Trademarks in Mexico: The Effects of the North American Free Trade Agreement*, 17 HOUS. J. INT'L L. 49 n.249 (1994) (discussing the Omnibus Trade and Competitiveness Act of 1988).

45. There is a oft-missed distinction between "Special 301" and "Super 301" actions. The U.S. Trade Act of 1974 created Section 301 as a statutory mechanism by which the United States enforces international trade regulations. Under "Special 301" powers, countries identified by the U.S. Trade Representative ("USTR") as not adequately protecting U.S. IP interests were placed into one of three designated categories: Priority Foreign Country, Priority Watch List, and Watch List. The former group was subject to the most stringent probing by the United States. Legislative changes to Section 301, via Section 1302 of the Omnibus Trade and Competitiveness Act of 1988, resulted in the "Super 301" provision. This proactive legislation required the USTR to identify "priority foreign country practices that if eliminated, would most benefit exports. Failure to offer market access leads to intergovernmental negotiations, and if those are unsuccessful, the United States takes the alleged offender to task under Section 301, generally using the WTO Dispute Resolution process. "Super 301" power has expired several times but it has been reinstated and is currently in force. See Kenneth J. Ashman, *The Omnibus Trade and Competitiveness Act of 1988: the Section 301 amendments*, 7 B.U. INT'L L.J. 115, 121 (1989) (Section 301 amendment considered a protectionist countermeasure, originally conceived to fend off the perceived trade threat from Japan;



337 of the Tariff and Trade Act of 1930, as modified by the Omnibus Trade Act, empowered, and virtually mandated, the President and United States Trade Representative ("USTR") to retaliate against countries that failed to control identified breaches of intellectual property or other improper trade practices.<sup>46</sup>

Developing countries objected to the linkage of intellectual property protection with trade law.<sup>47</sup> GATT's voting convention differed from that of WIPO, though. Voting at GATT only takes place after a consensus had been reached, and consensus was expected. This meant, effectively, that unless the opposition to a draft was significant, any dissenting nations would be pressured to quickly line up with the others. Clearly the divide between nations was not great enough to prevent a new draft mandate concerning IP, particularly with the ever-present threat of U.S. sanctions looming under Section 301.<sup>48</sup> Intimidation through legislation appeared to work. Consequently, the nations agreed to pursue a comprehensive IP rights agreement at the 1986 Uruguay Round of Multilateral Trade Negotiations.<sup>49</sup>

In its final draft, the TRIPS Agreement outlined mechanisms for the enforcement of intellectual property rights<sup>50</sup> and the resolution of disputes<sup>51</sup> that far exceeded those available under the Paris Convention. TRIPS implemented GATT's highly detailed Dispute Settlement Understanding ("DSU"), which pre-dated the formation of the World Trade Organization ("WTO") and the Uruguay Round.<sup>52</sup> Countries could, in theory, be held accountable for their trade behavior and IP violations, risking retaliatory measures if they failed to respond to rulings.<sup>53</sup> Of course, in addition to

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structurally, the removal of Presidential discretion prior to action against improper international trade practices is quite significant).

46. Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 301 (1990).

47. Warren Newberry, *Copyright Reform in China: A "TRIPS" Much Shorter and Less Strange than Imagined?*, 35 CONN. L. REV. 1425, 1430 (2003) (noting how linkage of intellectual property with trade at GATT would lead to more readily available sanctions).

48. SELL, *supra* note 28, at 109-10.

49. SODIPO, *supra* note 1, at 24-25.

50. TRIPS, *supra* note 6, pt. III.

51. *Id.* pt. V.

52. *Id.* art. 64.

53. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Dec. 15, 1993 Annex 2, Legal Instruments-Results of the Uruguay Round [hereinafter DSU], available at [http://www.wto.org/English/docs\\_e/04-wto.pdf](http://www.wto.org/English/docs_e/04-wto.pdf) (last visited Jan. 9, 2006).

GATT's dispute resolution process, the United States maintained its prerogative to take Special 301 action when dissatisfied with a WTO/GATT ruling.<sup>54</sup>

Additionally, GATT provided the United States and other developed nations with a highly favorable environment for negotiations. Within the confines of GATT, bargaining strength was correlated with a nation's relative economic power.<sup>55</sup> Consequently, developing countries no longer had equal footing with larger powers—a clear shift from the more egalitarian, United Nations-based, WIPO.<sup>56</sup> The bargaining power of developed countries at GATT/WTO was further enhanced by those countries' ability to leverage market access in trade negotiations with developing countries.<sup>57</sup>

The preliminary negotiations leading up to the TRIPS agreement did little to placate developing nations. The multiple rounds of negotiations and committee meetings that took place in order to reach agreement on the ground rules for IP protection were quite divisive.<sup>58</sup> Developing countries were justified in the belief that developed nations actively co-plotted strategies in advance of the official negotiating sessions. To illustrate, at a meeting of the Geneva session in May 1990, a European Community proposal entitled "Draft Agreement on Trade-Related Aspects of Intellectual Property Rights" was followed shortly by a similar proposal from the United States, bearing the same name and very similar contents.<sup>59</sup> Behind the scenes meetings of decision-makers have become an institution now at WTO meetings. "Green Room" meetings of select nations at WTO Ministerial Conferences suggests a two tier culture.<sup>60</sup>

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54. SELL, *supra* note 28, at 118-19.

55. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 341 (2002).

56. Convention Establishing the World Intellectual Property Organization, Jul. 14, 1967, 27 U.S.T. 1749, 828 U.N.T.S. 3.

57. Helfer, *supra* note 30, at 21.

58. *But see id.* at 4. Helfer argues that the current perspective of non-governmental organizations regarding the negotiations leading to the adoption of TRIPS represents "revisionist readings of . . . negotiating history."

59. The EC proposal is available as MTN.GNG/NG11/W/68 (Mar. 29, 1990). The United States proposal is MTN.GNG/NG11/W/70. *See* GERVAIS, *supra* note 18, 1.18 (comparing draft proposal on intellectual property rights by the EC and United States).

60. *See, e.g., WTO Briefing Note—Committee of the Whole* (Dec. 1, 1999), at [http://www.wto.org/English/thewto\\_e/minist\\_e/min99\\_e/English/about\\_e/resume01\\_e.html](http://www.wto.org/English/thewto_e/minist_e/min99_e/English/about_e/resume01_e.html) (last visited Apr. 7, 2006) (noting on official WTO website, that at the onset of the 3rd Ministerial Meeting of WTO in Seattle, U.S. Trade Representative Barshefsky openly mentioned that she "reserved the right to hold Green Room meetings" in spite of her preference for more inclusive, Working Groups of delegates). *See also* Aileen Kwa, Lamy's Rule-Less Negotiating Procedures Work Against the Weak (Apr. 5, 2006), <http://www.focusweb.org/content/view/865/36/> (last visited Apr. 7, 2006) (Pro-south organization discusses the implications of a last minute statement by WTO Director General that he might require ministerial involvement at an upcoming meeting in

After numerous bargaining sessions, frequently divided along the lines of developmental status or regional market concerns,<sup>61</sup> the new IP protection agreement, TRIPS, was opened for signing at the Marrakesh Meeting of Trade Ministers.<sup>62</sup> One hundred and fourteen contracting parties became subject to TRIPS at that time.<sup>63</sup> The stated mission of TRIPS was to “reduce distortions and impediments to international trade . . .” through “adequate protection of intellectual property rights.”<sup>64</sup> TRIPS established standards and norms for patents and six other forms of IP.<sup>65</sup>

The basal protection provided by TRIPS represents far more stringent coverage than that of the Paris and Berne Conventions,<sup>66</sup> precisely what the United States and other developed nations sought. Nonetheless, some scholars considered its patent protection excessively lenient.<sup>67</sup> But stronger patent protection had been anticipated by TRIPS, and it explicitly allows member nations to establish stronger domestic IP protections than that defined within the Agreement.<sup>68</sup> Nor does TRIPS prevent the establishment of bilateral or regional treaties containing stronger IP protections. The United States has pursued many such agreements subsequent to TRIPS.<sup>69</sup>

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Geneva. Concludes that countries without ministers or Green Room invitations might effectively be omitted from all negotiations).

61. *Id.* at 1.27–1.32 (discussing a variety of late hurdles, including: geographical marking concerns for European wine growers; some South American countries’ desire to include moral rights for copyrights; objections by U.S. pharmaceuticals to the incorporation of a transitional period for compliance; and India’s strong desire for the availability of compulsory licensing).

62. TRIPS, *supra* note 6.

63. There are 149 WTO members. They must abide by all WTO agreements, including TRIPS. “Observer” status nations are expected to become members. This includes Russia, Iraq and others. See World Trade Organization, Organization Members and Observer Governments, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) <http://www.wto.org/> (last visited Jan. 9, 2006).

64. TRIPS, *supra* note 6, pmbl.

65. IP rights protected by TRIPS include patents and copyrights, trademarks, geographical indications, industrial designs, integrated circuit schematics, and trade secrets. See TRIPS Part II.

66. Otten & Wager, *supra* note 14, at 396-97.

67. See Sherwood, *supra* note 8, at 494-95 (reporting that level of patent protection adopted by developing countries on the basis of TRIPS may not be “robust”, defined as the level necessary to stimulate investment).

68. TRIPS, *supra* note 6, art. 1(1).

69. Peter Drahos, The Bilateral Web of Trade Dispute Settlement (May 20-21, 2005) (unpublished manuscript for the workshop on “WTO Dispute Settlement and

### C. Substantive Features of TRIPS Relevant to Developing Nations

Textually, the TRIPS Agreement commences in a straightforward manner, proclaiming in its mission statement, that it desires “to reduce distortions and impediments to trade.” The Preamble also states that the Agreement aims to prevent IP protective measures from becoming barriers to legitimate trade.<sup>70</sup> Although at a superficial level this text seems benign, it is perhaps somewhat misleading with regards to IP not affecting “legitimate” trade. Strictly speaking, given the fact that a patent is a governmentally-issued, exclusive property right,<sup>71</sup> there are few structural constraints that could be imposed which would have a *greater* protectionist effect on trade.

TRIPS entails various norms and standards, including subject matter, available rights, the term of protection and exceptions, and mandates that patents must be available “without discrimination as to the place of invention.”<sup>72</sup> In defining these standards, TRIPS incorporated aspects of previous conventions—including most of the Berne and Paris Conventions—into the complete, extended agreement.<sup>73</sup> The additional elements superimposed on those earlier agreements has led many to call TRIPS the “Berne-plus and Paris-plus agreement.”<sup>74</sup>

### D. Issues Associated with the Breadth of TRIPS

Unlike the treatment afforded patent rights under the Paris Convention,<sup>75</sup> Article 27 of TRIPS broadly holds that patents are to be “available for any inventions, whether products or processes, in all fields of technology.”<sup>76</sup> This extended scope of patentability marked a clear victory for the United States and some of the other developed nations, and a defeat for the developing countries which sought to exercise some control over domestic patents.<sup>77</sup> Exclusions from the mandatory patent requirements

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Developing Countries: Use, Implications, Strategies, Reforms”, Univ. of Wisconsin, Madison) (on file with the author).

70. TRIPS, *supra* note 6, pmbl.

71. Adam Isaac Hasson, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT’L & COMP. L. REV. 373, 375 (2002).

72. TRIPS, *supra* note 6, art. 27(1).

73. Otten & Wager, *supra* note 14, at 396-97.

74. *Id.* at 397.

75. See generally Paris Convention, *supra* note 9 (permitting member states to limit patentable subject matter at their discretion, provided rules applied non-discriminatorily).

76. TRIPS, *supra* note 6, art. 27(1).

77. J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*,

may be made by countries in only a few limited categories. By contrast, under the Paris Convention, decisions on IP strength were made individually by member nations. The only requirement for nations was "national treatment"—there could be no distinction made on the basis of foreign or domestic markets when applying the rules.<sup>78</sup> Under TRIPS, exclusion from patentability can be invoked under Article 27 where preventing commercial exploitation is *necessary* to protect public order or morality, "including to protect human, animal or plant life or health or to avoid serious prejudice to the environment."<sup>79</sup> Additionally, "diagnostic, therapeutic and surgical methods for the treatment of humans" may be excluded from patentability.<sup>80</sup> TRIPS had recognized health issues, but the vague wording would give rise to much debate.

The influence of the IPC, and particularly of its pharmaceutical and computer industry executives, was most likely responsible for the inclusion of other industry-friendly, intellectual property components in TRIPS. For example, Section 7, Article 39 of TRIPS dealt with trade secrets, making it the first multilateral agreement to provide full protection to trade secrets.<sup>81</sup> Brief in its wording and basic in its scope, Article 39 can be hardly considered provocative or controversial by any particular nation or group.<sup>82</sup> The inclusion of trade secret protection in TRIPS was foreshadowed by the North American Free Trade Agreement ("NAFTA"),<sup>83</sup> a regional, trilateral settlement signed one year earlier between Canada, the United States, and Mexico.<sup>84</sup> From a policy standpoint, trade secret protection, referred to in Section 7 as "undisclosed information," appears geared squarely towards maintaining the confidentiality

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4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171, 182 (1993) [hereinafter Reichman, *TRIPS Component*].

78. See Evelyn Su, Comment, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries*, 23 HOUS. J. INT'L. L. 169, 179-80 (2000).

79. TRIPS, *supra* note 6, art. 27(2).

80. *Id.* art 27(3)(a).

81. *Id.* art. 39.

82. See Reichman, *TRIPS Component*, *supra* note 77, at 235-38 (taking a positive outlook on what was then still only *potential* trade secret inclusion in TRIPS).

83. North American Free Trade Agreement, Dec. 17, 1992 [hereinafter NAFTA], reprinted in 32 I.L.M. 289 (1993).

84. See DINWOODIE, *supra* note 17, at 563. NAFTA and the TRIPS Agreement are highly similar. NAFTA, though signed in 1993, was actually modeled on the backbone of an early TRIPS draft.

of regulatory filings, a major concern of the influential pharmaceutical industry.<sup>85</sup>

Concomitantly, healthcare issues are given very brief treatment in the original TRIPS agreement, which is astounding given the enormity of the treaty's scope.<sup>86</sup> Heavy profiteering by GlaxoSmithKline in its sales of AIDS medication to developing countries led to heavy criticism of the big pharmaceutical companies, and increased efforts to provide access to generics to fill a much needed void.<sup>87</sup>

### III. CHINA'S PUBLIC EMBRACE OF THE WTO AND TRIPS

Small developing countries had little choice but to join TRIPS in order to gain market access and financial stability.<sup>88</sup> China, however, did not fit into this category. While China coveted increased trade and investment revenues, the United States and western nations desired increased compliance and assistance from China with respect to piracy and counterfeiting issues.<sup>89</sup>

#### *A. Can a Tradition of IP Rights Ever Flourish in China?*

In recent years, there has been an unprecedented growth of commerce between the Republic of China and the world at large. Nevertheless, several recent high profile patent court decisions, as well as the virtually unabated piracy of copyrighted materials, have raised doubts about the resolve of the Chinese government to adopt the standards of international IP protection mandated by TRIPS. Pharmaceutical interests and other supporters of strong IP rights took umbrage with a Chinese administrative court ruling in July 2004. The occasion was a dramatic ruling from a review board in China's State Intellectual Property Office

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85. TRIPS, *supra* note 6, art. 39(3). See also GERVAIS, *supra* note 18, at 2.355 (protecting confidential information for industries needing regulatory market approval).

86. TRIPS, *supra* note 6, art. 27.

87. See Sitaraman Shankar & Ben Hirschler, *Indian Firm Aids Cocktail for \$1 a Day*, Common Dreams News Center (Feb. 7, 2001) <http://www.commondreams.org/headlines01/0207-03.htm> (last visited Jan. 9, 2006) (The article illustrates how an Indian generic manufacturer, Cipla, was able to drastically undercut the GlaxoSmithKline's prices. This likely pressured Glaxo and other firms to cut prices so as to avoid totally losing market share and receiving further embarrassing publicity); see also Rosie Murray-West, *Glaxo cuts price of Aids treatment*, TELEGRAPH, Apr. 28, 2004, <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2003/04/28/cnglax28.xml> (last visited Jan. 9, 2006) (providing specifics on price reductions).

88. TRIPS, *supra* note 6.

89. See SELL, *supra* note 28, at 45 (discussing the IPC lobbying the U.S. government to crack down on foreign piracy).

("SIPO"),<sup>90</sup> issued in response to a petition from twelve domestic Chinese pharmaceutical companies.<sup>91</sup> These companies had appealed the Chinese patent granted to Pfizer,<sup>92</sup> the American-based pharmaceutical behemoth, for the drug Viagra in 2001. At the time, Viagra was patented throughout the world. It has been suggested that SIPO's Patent Reexamination Board sympathized with the domestic manufacturers, and declared that the patent previously granted to Pfizer for Viagra had indeed failed to satisfy certain patent law requirements.<sup>93</sup>

Specific details regarding the board's decision have been somewhat scarce, but the rationale can be summarized by two legal theories. Some statements indicated that the board found Viagra's chemically active ingredient, sildenafil citrate,<sup>94</sup> had failed to satisfy the novelty requirement under China's patent law.<sup>95</sup> Others reported that the revocation of the patent resulted from a breach of Article 26 of Chinese patent law, due to Pfizer's failure to accurately and sufficiently describe Viagra's

90. The Chinese government created SIPO in 1998, to regulate intergovernmental IP concerns and international compliance. Newberry, *supra* note 47, at 1444.

91. See *China Defends Decision to Ignore Viagra Patent*, THE EPOCH TIMES, Jul. 17, 2004, <http://english.epochtimes.com/news/4-7-17/22377.html> (last visited Jan. 9, 2006) (China defends its decision to invalidate Viagra patent); Form 8-K, Third-Quarter 2004 Performance Report for Pfizer, Exhibit No. 99 Press Release (Oct. 20, 2004), available at [http://www.pfizer.com/download/investors/financial/8k\\_1020\\_04.pdf](http://www.pfizer.com/download/investors/financial/8k_1020_04.pdf) (last visited Jan. 9, 2006) (Pfizer promises to "vigorously appeal" Viagra patent loss).

92. The world's largest pharmaceutical firm, Pfizer's 2003 sales exceeded \$45 billion. Viagra generated almost \$1.9 billion in sales. 2004 Annual Financial Report 7, available at [http://www.pfizer.com/are/investors\\_reports/annual\\_2003/financial2003.pdf](http://www.pfizer.com/are/investors_reports/annual_2003/financial2003.pdf) (last visited Jan. 9, 2006); Nicholas Zamiska & Heather Won Tesoriero, *As Pfizer Battles Fakes in China, Nation's Police Are Uneasy Allies*, WALL ST. J., Jan. 24, 2006, at A1 (though the Viagra patent remains "in force" pending appeal, Chinese counterfeiters argue that it is no longer illegal to make Viagra).

93. See Patent Law of the People's Republic of China, arts. 2, 22, translated in [http://www.sipo.gov.cn/sipo\\_English/flfg/zlflfg/t20020327\\_33872.htm](http://www.sipo.gov.cn/sipo_English/flfg/zlflfg/t20020327_33872.htm) (last visited Jan. 9, 2006) [hereinafter Patent Law] (the requirements of "invention" patents in China are novelty, inventiveness and practicality).

94. Sildenafil citrate was first developed and prescribed as a treatment for angina, not erectile dysfunction, in 1991. See Sildenafil Citrate, HealthAtoZ, available at [http://www.healthatoz.com/healthatoz/Atoz/ency/sildenafil\\_citrate.jsp](http://www.healthatoz.com/healthatoz/Atoz/ency/sildenafil_citrate.jsp) (last visited Jan. 9, 2006).

95. "Novelty" is defined as "before the date of filing, no identical invention or utility model has been publicly disclosed in publications in the country or abroad or has been publicly used or made known to the public by any other means in the country, nor has any other person filed previously with the patent office an application which described the identical invention or utility model and was published after the said date of filing." See Patent Law, *supra* note 93, art. 22.

manufacturing process.<sup>96</sup> Either way, the enigmatic revocation of Pfizer's patent by SIPO is fairly representative of unresolved tensions with respect to the protection of international IP rights by China. In May, 2004, only two months prior to SIPO's decision to invalidate the Viagra patent, there was moderate fanfare surrounding the signing of an agreement between Pfizer and the Chinese government to enforce intellectual property rights and counter acts of piracy, indicating the dualities present in Chinese culture.<sup>97</sup> China is a prime illustration of the dynamics and pitfalls inherent to the protection of international intellectual property rights.

The relatively soft treatment of China by the WTO is a prime illustration of hypocrisy. China has publicly supported free trade, and has also displayed some support for the regulation of intellectual property. On December 11, 2001, China achieved its goal and became a contracting party to the WTO. Given the multilateral nature of the WTO, China also had to sign TRIPS.<sup>98</sup> China has implemented the necessary legislative changes prescribed under TRIPS. China was able to accomplish this by enacting the Trademark Law in 1982, Patent Law in 1984, Copyright Law in 1990, and others.<sup>99</sup> China also joined WIPO in 1980, one year after it began opening its marketplace to the rest of the world.<sup>100</sup>

China's entry into the WTO was not without controversy and resulted in some targeted opposition from the United States.<sup>101</sup> China availed itself of WTO regulations permitting a signatory nation to designate itself as a developing nation, a tactic that drew much criticism, but provided China with a longer transition window for full compliance with

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96. Those seeking patent protection for an invention must offer a description sufficiently clear so as to allow a person skilled in the relevant field to understand the drug. See Guo Nei, *Authorities: Viagra Patent Found Invalid*, CHINA DAILY, Jul. 7, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-07/09/content\\_346766.htm](http://www.chinadaily.com.cn/english/doc/2004-07/09/content_346766.htm) (last visited Jan. 9, 2006).

97. Press Release, Pfizer Inc., Pfizer Signs Agreement with Chinese Government to Enhance Protection of Patents (May 18, 2004), available at [http://www.pfizer.com/are/news\\_releases/2004pr/mn\\_2004\\_0518.html](http://www.pfizer.com/are/news_releases/2004pr/mn_2004_0518.html) (last visited Jan. 9, 2006) (detailing cooperative pact between parties on a Pfizer new release, specifically mentioning illegal Viagra production in China).

98. See *supra* note 63.

99. Brent T. Yonehara, *Enter the Dragon: China's WTO Ascension, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 390 (2002). But cf. Zhou Chuanjie, *Protection of Intellectual Property Rights in China*, 12 LOY. L.A. INT'L. & COMP. L.J. 68 (1989) (providing an extremely positive, early assessment of China's progress with respect to patent protection, from a Chinese attorney).

100. Weiqu Long, *Intellectual Property in China*, 31 ST. MARY'S L.J. 63, 69-70 (discussing steps taken by China to integrate into trading community).

101. *Id.* at 94.



TRIPS.<sup>102</sup> However, this was not a surprise to some, as China has always been a shrewd negotiator.<sup>103</sup>

Still, China is the source for billions of dollars in counterfeit goods, particularly ones in violation of copyright laws.<sup>104</sup> Given that these breaches have gone relatively unchecked in spite of strenuous complaints from the powerful entertainment lobby, China's enforcement of IP law in other industries is highly suspect.<sup>105</sup> An observer put the situation into perspective perfectly by laughing at the Chinese government's claims that it can not control piracy by imagining how quickly the factory manager would be thrown in jail if the factory distributed copies of a BBC special on the 1989 Tiananmen Square protests and violence.<sup>106</sup>

The SIPO review board's decision concerning the Pfizer Viagra patent ("Pfizer") may well portend weak protection of foreign patents, particularly in the pharmaceutical industry. It is hard to know to what extent protectionist factions have permeated SIPO. The *Viagra* decision might, after all, be based on a sincere legal analysis of the claim's novelty. Yet it is equally possible that this decision is symptomatic of the fundamental nature of China's legal culture and its lack of IP tradition.<sup>107</sup>

Some commentators have suggested that China's fundamentally different interpretation of the "rule of law" and deeply-rooted basis in Confucian ideology represents a significant roadblock in its acceptance of the primacy of IP rights.<sup>108</sup> China's historically stable society can be primarily attributed to the influence of Confucius, over 1500 years ago.<sup>109</sup>

102. See China and the WTO: Issues and Debates, available at <http://www.globalpolicy.org/socecon/bwi-wto/china/> (last visited Jan. 9, 2006) (collection of links relating to problems encountered as China prepared to join the WTO).

103. From a business perspective, China's strategy was smart. It maintained its position that it was a developing country, and consequently emerged from the proceedings with the maximum statutory leeway with respect to the timetable for fully implementing TRIPS.

104. Yonehara, *supra* note 99, at 392-93.

105. See, e.g., Neil King Jr., *Stuck on You: A Tiny Glue Seller Claims Identity Theft*, WALL ST. J., Nov. 22, 2004, at A1.

106. Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L. & COMP. L. REV. 127, 141-42 (2003) (arguing that Chinese government encourages piracy through its extremely aggressive censorship of media, which leads to black market distribution of goods to a wide segment of the population).

107. David W. Clark, *The Many Meanings of the Rule of Law*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 28, 35-36 (Kanishka Jayasuriya ed., 1999).

108. Yonehara, *supra* note 99, at 398-400.

109. H. PATRICK GLENN, *An Asian Legal Tradition: Make It New (With Marx?)*, in LEGAL TRADITIONS OF THE WORLD 301, 304-06 (2d ed. 2004).

Confucius attached strong significance to li, a collectivist philosophy that emphasizes the primacy of moral and social roles in conflict management.<sup>110</sup> Conversely, legal institutions and criminal law had little importance to Confucius.<sup>111</sup> They fall under the auspices of the concept of fa. Fa is seen as representing individual actions, not collective ones. Less credence is given, therefore, to the rights of original creators of goods.<sup>112</sup> Further complicating the situation is the fact that copying has been traditionally a highly respected component to the artistic process in China.<sup>113</sup> Communism in China, particularly during the Mao Zedong era,<sup>114</sup> generated attitudes which sharply contrast with personal profiteering.<sup>115</sup>

Significantly, some scholars reject the notion that China's cultural differences account for its failure to accede to the intellectual property rights regime.<sup>116</sup> They argue that, although traditional practices and beliefs might run counter to the spirit of IP legislation, this has hardly prevented the development of Chinese laws protecting IP rights.<sup>117</sup> This ignores or at least downplays the fact that China is clearly motivated to enact IP laws. That has very little connection with *enforcing* those laws.

The author believes that legislation does not always necessarily represent the intent or sentiments of the people or politicians. Legislation, on both the national or international level, frequently develops from any number of sophisticated strategic or pragmatic reasons. The enactment of domestic IP legislation in China may well be part of a systematic strategy designed to ease China into various trading pacts, such as the WTO and the coveted most favored nation ("MFN") status (now officially referred to as "normal trade relation", or "NTR" status).

Despite factors which limit natural acceptance of IP rights, China does have a history of enacting laws and engaging in intellectual property treaties, albeit under the strong influence of the United States. In 1903, under U.S. pressure, pre-communist China signed a bilateral treaty for reciprocal protection of intellectual property with the United States.<sup>118</sup> China joined the WIPO in 1980, instituted its own trademark law in 1982, a patent statute in 1984, entered into the Paris Convention in 1985,

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110. *Id.* at 304-05.

111. *Id.* at 305-06.

112. Yonehara, *supra* note 99, at 401.

113. *Id.*

114. Mao was the Chairman of the Communist Party of the People's Republic of China from its inception in 1949 to his death in 1976.

115. Yonehara, *supra* note 99, at 401.

116. Peter K. Yu, *Four Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 131-32 (2003).

117. *Id.* at 113.

118. Newberry, *supra* note 47, at 1436.

and passed copyright legislation in 1990.<sup>119</sup> Despite these efforts, a lack of enforcement led to U.S. threats of Special 301 retaliation, revocation of China's most favored nation status, and blockage of China's bid to join the WTO.<sup>120</sup> This pressure resulted in the signing of the Memorandum of Understanding on Intellectual Property [hereinafter "MOU"] between the two nations in 1992, which subsequently obliged China to enter into the Berne and Geneva Conventions, and to revise its copyright laws.<sup>121</sup>

China's reluctant support of strong IP regulations should not be confused with its desire for strengthened trade, which was its impetus for joining the WTO.<sup>122</sup> With a population of 1.3 billion people,<sup>123</sup> China's economic stability is of paramount importance to the hegemony of the Communist Party. China's economy has changed over the past two decades, as charted by Deng Xiaoping.<sup>124</sup> Deng's "open door" policy brought Chinese laws—if not practices—closer to those of the West with respect to economic matters.<sup>125</sup> While still officially committed to Communism, China has increasingly encouraged capitalist ventures, even via official governmental youth organizations.<sup>126</sup>

Internal conflict over the implementation of international IP regulations is not unique to China. TRIPS provides the blueprint for harmonizing global minimum national IP standards,<sup>127</sup> and as such, controversy has arisen between the interests of developed, developing, and under-developed nations. India, for example, vigorously debated TRIPS and recently ceded to a TRIPS-mandated deadline of January 1, 2005 for modifying the Indian Patents Act to provide enhanced protection for pharmaceuticals, food, and chemicals.<sup>128</sup>

119. *Id.* at 1438-39.

120. *Id.* at 1439.

121. *Id.*

122. Yonehara, *supra* note 99, at 390.

123. See THE WORLD FACTBOOK, *supra* note 10, at 115 (China has an estimated population of 1,306,313,812).

124. Yonehara, *supra* note 99, at 402.

125. Laurence P. Harrington, *Recent Amendments to China's Patent Law: The Emperor's New Clothes*, 17 B.C. INT'L & COMP. L. REV. 337, 343 (1994).

126. See, e.g., Geoffrey A. Fowler, *Chinese Youth League Turns New Path: Madison Avenue*, WALL ST. J., Jan. 25, 2005, at A1 (Communist Youth League teaching capitalism across China); Steven Gray & Geoffrey A. Fowler, *China's New Entrepreneurs*, WALL ST. J., Jan. 25, 2005, at B1 (American business models embraced by franchisees, particularly in a growing restaurant industry that produce an astounding \$90 billion in sales in 2005).

127. TRIPS, *supra* note 6.

128. See ICTSD, *Indian TRIPS—Compliance Legislation Under Fire*, 9(1) BRIDGES

Activists concerned with global trade inequities have argued that TRIPS protects corporate interests at the expense of individual welfare.<sup>129</sup> Indeed, while increased investment should almost certainly generate improvements in developing nations' infrastructure, it won't preclude the negative effects of corruption at the state level, which will be more likely in some countries than others.

### *B. Risks Associated with China's Inflated Economy*

The undeniably large piracy issue in China has been one of the primary forces driving the western desire for increased IP protection in China and other parts of Asia.<sup>130</sup> In response, China has publicly stated that it supports increased IP protection to avoid a repeat of its loss of direct Japanese investment in the 1990s.<sup>131</sup> Notwithstanding its weak IP protection, the growth of the Chinese economy, combined with a cheap, educated labor force ensures that western nations can't afford to turn their backs on China's marketplace.<sup>132</sup>

Again, the main reason for China's official support for TRIPS rests in the accompanying trade benefits from GATT membership. Being privy to the WTO and GATT provides China with the greatest prize: clear access to the global market. However, unlike earlier trade forums, its inclusion as a full partner in TRIPS/WTO is not linked to humanitarian and human rights issues.

Economic development in China is flourishing, with growth at record levels.<sup>133</sup> Astoundingly, China now accounts for one-quarter of the world's

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WEEKLY DIGEST, Jan. 19, 2005, <http://www.icts.org/weekly/05-01-19/story2.htm> (last visited Jan. 9, 2006).

129. See, e.g., *WTO nears deal amid protests*, CNN (online), available at <http://www.cnn.com/2005/BUSINESS/12/17/wto.protests/index.html> (last visited Apr. 17, 2006) (discussing the December 2005 round in Hong Kong); *Arrests in Montreal anti-WTO Protests*, CBC NEWSWORLD, July 28, 2003, [http://www.cbc.ca/stories/2003/07/28/wto\\_protests030728](http://www.cbc.ca/stories/2003/07/28/wto_protests030728) (last visited Jan. 9, 2006) (discussing the Montreal protests); see generally Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L. & COMP. L. 257 (2000) (discussing the Seattle protests).

130. Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decisions for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 484 (2004).

131. Newberry, *supra* note 47, at 1450.

132. See Zamiska, *supra* note 92 (consider Pfizer, fighting to revive its Viagra patent and struggling to induce a Chinese response against counterfeiters, yet carrying on business as normal).

133. *Retail Data Suggests Balanced Growth for China*, WALL ST. J., Nov. 16, 2004, at A22 [hereinafter *Retail Data*] (annual economic growth rate in China currently at more than 9 percent); *China Stresses Need to Develop Capital Markets*, WALL ST. J., Jan. 10, 2005, at A10 [hereinafter *Capital Markets*] (tax director states that China's economy grew by an inflation-adjusted 9.2% in 2004, virtually identical to its 9.3% estimated

growth. Urban centers in China have undergone unprecedented growth in the past decade and retail sales are booming.<sup>134</sup> Foreign investors enjoy the benefits of the currently booming Chinese economy.<sup>135</sup> They have access to a comparatively cheap labor force, a growing supply of engineers and other professionals, favorable tax concessions, a rich supply of commodities, and a marketplace that can now afford to purchase more expensive products that would have been destined for export to the West only a few years ago.

Still, the rapidly expanding Chinese economy provides reason for some concern. No economy can sustain such a record of maximal growth rates indefinitely in a competitive global marketplace. Economies move in cycles. The burden of managing an economy amidst intense growth is difficult, and former Federal Reserve Bank Chairman Alan Greenspan expressed concerns about China's growth rate.<sup>136</sup> Although, controlling interest rates and the monetary supplies can prevent excessive inflation and permit stable, less punctuated growth, the actions of a central bank can only limit damage to a degree. Tough decisions lie ahead for China, especially since some strong political forces in the United States demand that it free its currency from its valuation tie with the U.S. dollar.<sup>137</sup>

The head of the Central Bank in China, Zhou Xiaochuan, is aware of the difficulties and dangers of China's current economic growth and has commented on the need for a maturation of the corporate financing system in China.<sup>138</sup> Recognizing a potential problem, however, is but one step in an overall solution: it remains to be seen whether Zhou will be able to stay ahead of the curve and keep inflationary pressures under control. In recent years, rapid growth has brought much wealth into selected areas of China. Consequently, there are a limited number of moves

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growth the previous year. Accounting for inflation, the growth rate would rise to approximately 15%).

134. See Retail Data, *supra* note 133 (suggesting balanced growth for China).

135. *Id.* (noting foreign direct investment increased by over 23 percent).

136. Greenspan: *China's economy may be overheating*, PEOPLE'S DAILY ONLINE (English ed.), Apr. 22, 2004, available at <http://english.people.com.cn/other/archive.html> (follow "Year 2004: April" hyperlink; then follow "April 22, 2004" hyperlink) (last visited Apr. 17, 2006).

137. John H. Makin, Opinion, *For a Few Dollars More*, WALL ST. J., Nov. 15, 2004, at A22.

138. See Capital Markets, *supra* note 133. Zhou frequently makes well-nuanced remarks to prevent strong marketplace corrections. Cf. U.S. Federal Reserve Chairman Alan Greenspan, famously speaking of "irrational exuberance" in the marketplace, available at <http://www.federalreserve.gov/BOARDDOCS/SPEECHES/19961205.htm> (last visited Jan. 9, 2006).

that Zhou can take to counter the economy's momentum, particularly since its currency is artificially "pegged" to the value of the U.S. dollar, rather than on the basis of Chinese market conditions.

An additional concern during any economic downturn is the increased number of loan defaults, which can cause serious harm to a nation's banking infrastructure.<sup>139</sup> Improperly issued loans, fraudulent collateral, and a general lack of banking experience can cause this phenomenon. Internal corruption can compound the potential damages of loan default. Significantly, there already exist indications that China has internal problems with its banking system. Most recently, the chairman of China's largest real estate bank, the China Construction Bank, resigned amidst a corruption probe.<sup>140</sup>

It is difficult to make accurate long-term economic predictions. China might emerge from this economic cycle unscathed without undergoing any drastic corrections. Nevertheless, it would be troubling if developed nations enjoyed the fruits of the Chinese economy without appropriate consideration for the hundreds of millions of rural Chinese inhabitants, many of whom do not have access to running water. Some estimates suggest that there could be more than one hundred million farmers without full-time employment, many of them leading a nomadic existence in search of work.<sup>141</sup> If a country of this size does undergo a large-scale recession, the consequences to the population could be severe and dramatic. Could the Chinese government afford to expend vast sums of money to feed its population? Would doing so only deepen the financial problems? Would the central government instead leave these decisions and tasks to the rural collectives that currently do much of the day-to-day governing? Would the Chinese government admit to a crisis if one existed?

Unfortunately, governments do not always act in the best interests of their citizens. While developed nations cannot be expected to repress their economic competitiveness, they must be mindful of the consequences, particularly when dealing with other nations with relatively disenfranchised citizens.<sup>142</sup> It is not overly idealistic to demand a higher level of ethics

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139. China's banking system is set up with several tiers of loans and loaning institutions. A potential problem lies with State Operated Enterprises (SOE) that typically lose large sums of money. See Joseph W. Dellapenna, *The People's Bank of China*, in CHINA AND HONG KONG IN LEGAL TRANSITION, COMMERCIAL AND HUMANITARIAN ISSUES 81, 82 (Joseph W. Dellapenna & Patrick M. Norton eds., 2000).

140. Andrew Browne & Kate Linebaugh, *Corruption Probe Clouds Chinese Banks' IPO Plans*, WALL ST. J., Mar. 16, 2005, at A23, available at <http://chinascope.org/en/newsdetail.php?id=1244> (last visited Jan. 9, 2006).

141. THE WORLD FACTBOOK, *supra* note 10, at 116.

142. See Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's Sovereignty in the Absence of Security Council Approval*, 22

from the world's stronger trade partners. These goals can be manifested through government advisory panels on acceptable corporate trade practices, sanctions against firms that breach good trade practices in foreign countries, and the opportunity to earn tax credits for outstanding corporate behavior, particularly where it involved a sacrifice.

#### IV. A SEARCH FOR ANSWERS: PARADIGMS IN INTELLECTUAL PROPERTY THEORY REVISITED

##### *A. TRIPS Needs Strong Safeguards to Protect Poorer Populations and Provide for Long-Term Growth Prospects*

The utilitarian philosophy at the heart of U.S. IP policy is explicitly expressed in the Constitution.<sup>143</sup> The underpinnings of IP rights in European countries, by contrast, rise largely from the Lockean "natural rights" belief that an individual is morally entitled to the product of his labor.<sup>144</sup> These incentive and reward-based theories represent highly idealized perspectives and are not, in and of themselves, sufficient to explain the adoption of IP rights by many nations. Though the philosophies may justify much of the IP protection in the developed world, they hardly suggest the same potential payout to under-developed and developing nations.

Disregard for nations' historical differences is a significant roadblock to equity in IP law. Though extrapolation can lead to inaccurate predictions, it should be noted that most developed nations with strong, domestic IP traditions took well over a century before these regimes became entrenched.<sup>145</sup> Under TRIPS, developing countries struggling to build their own economic infrastructures in the wake of colonial era institutions have a finite time period in which to comply with detailed trade and IP restrictions.<sup>146</sup>

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HOUS. J. INT'L. L. 403, 406 (2000) (portraying the decision by the United States and NATO to intervene in Kosovo for humanitarian purposes as indicative of the "emerging norm in international law," whereby the global community does not passively tolerate violations of citizens' human rights by their government).

143. The "intellectual property clause" in the Constitution. U.S. CONST. art I, § 8, cl. 8, holds that Congress has the power to "*Promote the Progress of Science and Useful Arts . . . for limited times*" (italics added). Some scholars argue that current U.S. IP legislation (e.g. greatly extended copyright terms) bears little relation to the original intent, which was to provide incentives for the creative or inventive process.

144. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 42 (1996).

145. Ragavan, *supra* note 22, at 149.

146. *Id.* at 150.

There is a nexus between utilitarian theory and practical policy considerations that provides a justification for much of the developed world's IP rights protections. IP policy can be a very powerful economic tool when operated at the state level. A nation's IP policy vision can lead to maximized access to crucial technology and the ability to exert strong, though indirect, control of labor costs. Historically, some nations adopted IP protection regimes to recruit creative capital by extending offers of strong IP protection.<sup>147</sup> Many developing nations, including India, were colonies until well into the twentieth century.<sup>148</sup> These countries contend with high levels of poverty and essentially no middle class. When such a country seeks membership in GATT/WTO for trade benefits,<sup>149</sup> it must also accept other multilateral agreements, such as TRIPS, and must implement an IPR regime from a vastly different culture, that almost certainly bears no similarity to everyday norms. Convincing their citizens that adopting a protective IP regime will ultimately be beneficial, in spite of increased short term costs, may be all but impossible for democratic governments in developing countries.<sup>150</sup>

In contrast, developed countries have the luxury of being able to import creativity, via educated manpower, from other nations. This interest in accumulating intellectual property potential lies at the heart of many immigration policy decisions in developed nations.<sup>151</sup> It plays a large role in determining the overall volume of visa eligibility, and the acceptance of special classes of immigrants, such as those with advanced degrees. This is particularly true with respect to engineering students and accomplished high-level scientists from military or ideological opponents.<sup>152</sup> Many relevant immigration policy decisions in the United States and elsewhere are enacted at a sub-legislative level, by administrative agencies that are buffered from domestic and international pressures. Developed countries can literally buy the brainpower required to help meet various goals. There is, however, no *quid pro quo* for the nations

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147. *Id.* at 122.

148. *Id.* at 149.

149. *E.g.*, Most Favored Nation Treatment; TRIPS, *supra* note 6, art. 4.

150. *See id.* at 171, 180-81 (discussing the strong motivation for citizens to rally against TRIPS in India and Argentina and the political realities facing the Indian government's efforts to increase patent protection on drugs).

151. *See, e.g.*, Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 977 (2002) (illustrating the historical flexibility of U.S. immigration policy); Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 99-102 (2001) (advocating formalized selection process to screen for immigrants likely to produce significant net benefit for the United States).

152. For example, Niels Bohr, Edward Teller and Enrico Fermi were a few of the many émigrés to the United States involved in the Manhattan Project.



from which these scientists migrated. The less-developed nations are essentially powerless in this transaction, unable to provide matching economic incentives to their most creative individuals, yet unable to reach a more advanced economic level unless they retain these individuals.

The North-South<sup>153</sup> framework has provided a basis for understanding the basic, yet emotional differences of opinion between developed, least-developed, and developing nations concerning TRIPS. It also offers insight into the critical interplay between China and TRIPS, and illustrates the socio-economic issues present in efforts to increase and modify China's position as a global trader. Increased trade has failed to produce much benefit for the South in terms of improvements in the most basic standard of living (life expectancy, per capita income, daily caloric intake and medical access), when compared to the North.<sup>154</sup>

In light of the acrimony and doubt felt by many developing nations with regards to the new IP regime, flexible aspects of TRIPS were emphasized. Some areas of sensitivity were noted as being necessary in order to bring developing and least-developed countries comfortably into the fold.<sup>155</sup> "Transparency of process" was believed to make it easier for countries to simply make the correct choice, rather than face domestic embarrassment.<sup>156</sup> This was manifested in the transitional stage, the five- or eleven-year periods available to developing or least-developed countries to bring themselves up to standard levels.<sup>157</sup> Technical assistance was made available to countries such as China under Article 67, provided they moved forward (at least in the view of the developed, decision-making nations in TRIPS) in implementing tightened IP rights legislation.<sup>158</sup> As of January 2005, initial signatories to TRIPS that took advantage of these transitory periods are required to be fully compliant with all components of the treaty, as the transitional periods have lapsed,<sup>159</sup> though newer members such as China are still in transition.

A pivotal issue with respect to TRIPS is whether countries at various stages of development, such as China, will actually benefit from this

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153. Su, *supra* note 78, at 196-97.

154. *Id.* at 196.

155. See Reichman, *Compliance*, *supra* note 7, at 368-69.

156. *Id.*

157. TRIPS, *supra* note 6, arts. 65, 66.

158. *Id.* art. 67; Otten & Wager, *supra* note 14, at 410.

159. For example, India recently adopted legislation requiring its domestic pharmaceutical industry to comply with TRIPS by January 1, 2005, <http://news.bbc.co.uk/1/hi/business/4148903.stm> (last visited Jan 19, 2005).

new intellectual property rights regime.<sup>160</sup> Developing countries must take advantage of access they have been granted to developed countries' marketplace for agricultural and textile products, and maximize their importation of technology, the *quid pro quo* to their increased protection of foreign IP rights.<sup>161</sup> It is worth considering whether developed nations would have either the wherewithal or desire to actually isolate or condemn larger economic powers such as China for failure to ratify TRIPS. U.S. Congressional efforts to deny China most-favored nation (MFN) status prior to its ascension to GATT and the WTO did not succeed.<sup>162</sup> The WTO recognized the non-static nature of TRIPS and the issues affecting the international community, scheduling reviews to allow for minor revisions.<sup>163</sup>

Is it possible that existing provisions are sufficient to help developing countries become competitive trading partners, and avoid devastating loss of domestic jobs in some of the few traditional areas of mature industrialization? The optimistic view is that talk of doom and potentially massive problems in China and elsewhere are simply idle conjecture, and that TRIPS will aid in the spread of financial and social prosperity. It is possible that a favorable economic cycle could lead to a period of increased growth and technology transfer in the developing countries. Unfortunately, even if this occurs, without competent business and government decisions, it is questionable how much of an effect such changes will have on the welfare of Chinese citizens.

What measures must be taken to increase compliance and enforcement of domestic regulations in China? What will be the fate of the nations' pharmaceutical industries, which have thrived for years under national systems that did not have patents? Will that have an effect on affordability of health care and subsequently on welfare of affected citizen? Idealists, or perhaps optimists, have suggested that TRIPS can work for developing nations through a concerted effort to ensure adequate technology transfer, amidst a "non-confrontational" environment.<sup>164</sup>

The journey to the present TRIPS regime was acrimonious, as described above. Today, in spite of the WTO's ever increasing number of contracting parties, and the large, diverse populations that they entail, TRIPS remains extremely unpopular with many groups. This was first highlighted in

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160. Oddi, *supra* note 3, at 457-60.

161. Reichman, *Compliance*, *supra* note 7, at 375-76 (discussing the balancing act between strengthened IP regulations and antitrust law).

162. Newberry, *supra* note 47, at 1439; TRIPS, *supra* note 6, art. 4.

163. Otten & Wager, *supra* note 14, at 413.

164. See generally Reichman, *TRIPS Component*, *supra* note 77 (notwithstanding practical problems and philosophical contradictions underlying TRIPS, fair competition might still be feasible).

dramatic fashion in Seattle at the 1999 WTO Ministerial Conference.<sup>165</sup> Opposition to TRIPS is strongest amongst citizens of poorer, developing nations,<sup>166</sup> regardless of official governmental policies.

### *B. Increased Corporate Responsibility*

The ideal means of alleviating welfare concerns and human rights issues in developing countries is through a heightened level of corporate responsibility.<sup>167</sup> A narrow legal basis for imposing liability on corporations arguably exists when a foreign corporation operates as a government agent<sup>168</sup> or is complicit in the illegal actions of others.<sup>169</sup>

Practically speaking, while the concept of corporate responsibility can apply to abusive, discretionary corporate acts, it has little nexus with ministerial business practices of western firms. Businesses only represent the interests of their equity investors and creditors within the confines of the legal system. There needs to be some means of extending moral expectations onto domestic firms that operate abroad.

Corporate activity abroad by U.S. corporations is, for the most part, subject to minimal U.S. regulations concerning everyday business practices. While bribing a foreign official is a punishable offense under the Foreign Corrupt Practices Act,<sup>170</sup> everyday transactions are more likely

165. Assafa Endeshaw, *The Paradox of Intellectual Property Lawmaking in the New Millenium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot*, 10 CARDOZO J. INT'L & COMP. L. 47, 49 (2002).

166. See World Trade Organization, Understanding the WTO: Least Developed Countries, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Jan. 9, 2006) (technically, WTO nations are categorized as either "developed", "developing", or "least-developed." Least-developed status is based on a U.N. listing. Countries determine which of the other two categories they fall under, though this can be challenged by other nations). See also World Trade Organization, The 10 Misunderstandings: 3. Ignores Development, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/10mis\\_e/10m03\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m03_e.htm) (last visited Jan. 9, 2006) (discussing extended transition periods for developing and least-developed countries, as well as some exemptions for the latter).

167. See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (arguing that the state should not be the sole guarantor of human rights and that treaties have ignored corporate responsibility for too long).

168. *Id.* at 499-500.

169. *Id.* at 502.

170. See generally Richard J. Hunter et al., *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U.L. REV. 851, 869 (2003) (discussing the Foreign Corrupt Practices Act (FCPA) under which U.S. companies and individuals can be found liable

to be regulated by foreign legislation. A pharmaceutical firm from a developed nation that refused to sell a drug in a developing country because it would not be able to recoup its production costs, or that charged customers in developing countries the same amount as those in developed countries, would grossly and negatively impact the welfare of the people, yet would be guilty of nothing other than adhering to a strict cost-benefit analysis.

Strong public pressure occasionally plays a role in influencing corporate action, at seen from the negative publicity garnered by GlaxoSmithKline.<sup>171</sup> Other companies have subsequently followed suit, dropping prices for their AIDS drugs as well.<sup>172</sup>

However, public pressure does not always result in good corporate behavior, even when a grave wrong has occurred. A cyanide gas leak in 1984 from Union Carbide's plant in Bhopal, India resulted in over 2,000 deaths.<sup>173</sup> Litigation over the incident dragged on for years in Indian and American courts. The defendants spent years attempting to have the civil case removed from U.S. jurisdiction on the basis of *forum non conveniens*,<sup>174</sup> amongst other procedural defenses, before finally settling for a fraction of the actual damages.

Extreme examples of corporate misbehavior that injure foreign citizens such as the Bhopal disaster may be more reachable now, though this does not necessarily portend changes to general foreign trade practices. The recently resurrected Alien Tort Claims Act ("ATCA")<sup>175</sup> provides an additional mechanism by which the jurisdiction of U.S. courts can extend to individual actors belonging to domestic corporations who, in concert with state actors, are responsible for committing torts on foreign soil against foreign nationals.<sup>176</sup> There are other, more controversial implications arising from ACTA; but looked at narrowly, ATCA allows American courts to review certain foreign activities by U.S. corporations.

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for bribery after offering a foreign official a payment in order to obtain or retain business).

171. Endeshaw, *supra* note 165, at 50.

172. See Ragavan, *supra* note 22, at 176. Bristol-Myers, Merck and Roche drastically discounted prices for AIDS medications in South Africa.

173. *In re Union Carbide Corporation*, 809 F.2d 195, 195-97 (2d Cir. 1987) (aff'g Union Carbide appeal regarding lack of U.S. jurisdiction in part and denying it in part).

174. See Martine Stuckelberg, *Lis Pendens and Forum Non Conveniens*, 26 BROOKLYN J. INT'L L. 949, 956 (2001) (Supreme Court uses a balancing test, assessing public and private interests, to determine if the case should be heard in an alternative forum).

175. 28 U.S.C. § 1350 (2003).

176. Sonia Jimenez, *The Alien Tort Claims Act: A Tool For Repairing Ethically Challenged U.S. Corporations*, 16 ST. THOMAS L. REV. 721, 723 (2004).

Anticipating ethical and moral behavior from corporations is all but impossible without incentives and penalties. As discussed in the next section, one motivation for corporations to take appropriate action with respect to IP practice might lie in their desire to prevent the imposition of compulsory licensing.

### *C. The Doha Declaration's Clarification of the Role of Compulsory Licensing*

Compulsory licensing is the practice by which a government issues licenses to use a patented product without the permission of the patent holder. Typically, this only occurs when there is a strong need for intervention.<sup>177</sup> The concept of compulsory licensing is still controversial amongst the more polarized proponents of strong IP rights.<sup>178</sup> Some interesting points can be made that compulsory licensing ultimately does not provide a net, long-term benefit for the nation imposing it. Indeed, rational arguments can be made against its use in all but the most exceptional of circumstances,<sup>179</sup> yet barring an unforeseen increase in corporate responsibility, any balancing of public and corporate welfare issues ought to favor the health of the general public over corporate profits in emergency situations.

Article 31 of TRIPS, "Other Use Without Authorization of the Right Holder," permits compulsory licensing under limited circumstances.<sup>180</sup> Compulsory licensing may be employed if attempts are first made to acquire the rights to the patented product from the patent owner.<sup>181</sup> However, if a national emergency has occurred, this requirement may be waived.<sup>182</sup> Compulsory licensing does not represent a back-door to IP piracy and profiteering. Article 31 makes clear its limits, holding that compulsory licenses are not assignable,<sup>183</sup> and should be used primarily

177. Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPS Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 945 (2000).

178. Richard H. Marschall, *Patents, Antitrust, and the WTO/GATT: Using TRIPS as a Vehicle for Antitrust Harmonization*, 28 LAW & POL'Y INT'L BUS. 1165, 1189 (1997).

179. See Ford, *supra* note 177, at 953-54 (noting U.S. objections to compulsory licenses for a litany of reasons).

180. TRIPS, *supra* note 6, art. 31.

181. *Id.* art. 31(a), (b).

182. *Id.* Compulsory licensing permitted following a failed effort to obtain authorization from the patent holder, within a "reasonable period of time." In the event of a national emergency or extreme urgency, this requirement can be waived.

183. *Id.* art. 31(e).

for domestic purposes.<sup>184</sup> Additionally, Article 31 requires that the “right[s] holder shall be paid adequate remuneration.”<sup>185</sup>

The wording of Article 31 leaves several issues open to interpretation. No definition of an “emergency” is provided, although the Doha Declaration on the TRIPS Agreement and Public Health clarified the matter somewhat.<sup>186</sup> The Doha Declaration states that the TRIPS Agreement “can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicine for all.”<sup>187</sup> Each country ultimately has the power to determine what constitutes a national emergency.

The Doha Declaration’s relaxed interpretation of compulsory licensing standards have not been widely used yet, partly due to the pharmaceutical industry’s retreat from its aggressive posturing throughout the 1990’s and early 2000’s. They have avoided confrontation and the specter of compulsory licensing clause by heavily discounting drug prices in many developing countries.<sup>188</sup> It is difficult to predict how, or if, this equilibrium will change in coming years, particularly if less newsworthy medical conditions are involved.

The Doha Ministerial Declaration represents a formal review of TRIPS, as mandated by Article 71 of TRIPS, “Review and Amendment.” TRIPS’ drafters had enough foresight to recognize that TRIPS was a living document that would need to evolve in the face of new IP issues and sub-agreements.<sup>189</sup> In addition to analyzing compulsory licensing, the Doha session resulted in the grant of an extension to least-developed nations to come into full compliance with TRIPS.<sup>190</sup> Provided the Doha Declaration is accepted as a binding agreement by TRIPS signatories, and is therefore a binding legal commitment, compulsory licensing may alleviate TRIPS-related health concerns in developing nations. Hopefully the Doha Declaration will be given full faith and credit by all WTO members.<sup>191</sup>

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184. *Id.* art. 31(f).

185. *Id.* art. 31(h).

186. Declaration on the TRIPS Agreement and Public Health at Qatar, 2001, WTO Fourth Ministerial Conference, WT/MIN(01)/DEC/1 (01-5859), Nov. 9-14, 2001 [hereinafter Doha TRIPS Declaration], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (last visited Jan. 9, 2006). See TRIPS, *supra* note 6, art. 71(1) (specifying that the entire agreement comes under biennial review).

187. Doha TRIPS Declaration, *supra* note 186. The Doha Ministerial Declaration on TRIPS emphasizes the “flexibility” and “discretion” that nations can use in deciding whether to take extraordinary action to protect public health.

188. See Ragavan, *supra* note 22, at 176.

189. GERVAIS, *supra* note 18, at 370.

190. Doha TRIPS Declaration, *supra* note 186, para. 7.

191. Peng Jiang, *Fighting the AIDS Epidemic: China’s Options Under the WTO TRIPS Agreement*, 13 ALB. L.J. SCI. & TECH. 223, 237 (2002) (discussing whether Doha

The issue of what constitutes “adequate remuneration” was not fully addressed by TRIPS or the Doha Declaration. According to Article 31, patent rights holders are due “adequate remuneration . . . taking into account the economic value of the authorization.”<sup>192</sup> This vague language raises potentially troublesome issues, owing to the wide discrepancy in what the various parties would likely consider “adequate.” Market conditions in neighboring countries with similar economic conditions should be used to establish the market value of the license, according to one commentator.<sup>193</sup>

The Chinese government frequently limits or restricts the disclosure of information related to medical epidemics. China was highly secretive with respect to the recent SARS epidemic,<sup>194</sup> which ultimately killed thousands, and acted similarly with respect to the spread of AIDS.<sup>195</sup> Secrecy and national pride are not policies that should be encouraged or tacitly condoned by the international community, yet they are a reality of Chinese life. The Chinese need to adopt a policy that makes it easier for affordable drugs to be distributed to the Chinese population, particularly the majority of the population that still lives an agrarian existence. Only a system that combines affordability with ease of access, without requiring the central government to “lose face” by publicly admitting that their communist paradise has healthcare problems will succeed.

One recent, highly encouraging development involved U.S. governmental involvement and indirect subsidization of AIDS drugs in Africa. The Food and Drug Administration (“FDA”) has “tentatively” allowed a South African pharmaceutical company to market a generic AIDS cocktail.<sup>196</sup> Whether this is an indicator of further good will and future

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represents (1) a subsequent agreement; (2) the beginning of subsequent practice showing members interpretation of TRIPS; or (3) a “mere declaration of commitment and intent that does not constitute an enforceable legal obligation”, as this technical interpretation could make a difference under the terms of TRIPS dispute resolution mechanism, which restricts the use of “supplementary” materials except in situations involving ambiguity).

192. See TRIPS, *supra* note 6, art. 31.

193. See GERVAIS, *supra* note 18, at 252 (stating that sales that could have been achieved by the compulsory licensing party can be used as an alternative indicator of value).

194. See generally David P. Fidler, *Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism and Realpolitik*, 35 GEO. WASH. INT'L L. REV. 787 (2003) (pointing out the dangers involved in governmental secrecy surrounding health epidemics such as SARS).

195. Jiang, *supra* note 191, at 224.

196. Donald G. McNeil Jr., *A Path to Cheaper AIDS Drugs for Poor Nations*, N.Y. TIMES (online ed.), Jan. 26, 2005, available at <http://www.nytimes.com/2005/01/26/health/26aids.html> (free subscription required) (last visited Jan. 9, 2006).

social concern on the part of the United States is unclear, given the strength of the pharmaceutical lobby. One hopes that it eases the hard line policies of recent years.

Enhancing the welfare of individuals and increasing corporate returns are goals that can co-exist. Avoiding excessive greed and using common sense can lead to increased political capital for parties that aspire to be good global citizens. Though this sounds highly idealistic, it is more a function of long-term corporate planning with respect to international markets. While China has a booming economy and represents a huge marketplace for both exports and imports, it remains a heavily managed, restricted society that is largely agrarian and under-industrialized, in spite of the contrary images and articles in western media. With collectivism entrenched in Chinese society, developed countries must act responsibly and not take advantage of its marketplace and labor force to ensure that individual rights are safeguarded.

Developed nations must ensure that citizens from countries with weaker legal, social and economic frameworks are not forgotten in the name of profits. While increased corporate responsibility can help ensure a better future for the citizens of developing countries, realistically only a firm commitment to the Doha Declaration, accompanied by a resolution of the "reasonable price" issue, provide any solid guarantees. Productive biennial Article 71(1) reviews by the TRIPS Council will be necessary in order to achieve and maintain a balanced situation where entrepreneurial efforts are rewarded with universally recognized patent rights amidst a flexible framework that addresses the welfare and health concerns of poorer representatives of the world's economic community. These 71(1) reviews must be seen by member nations to represent nothing less than the intended interpretation of TRIPS, not supplementary matters.

## V. CONCLUSION

Globalization promises much to both developed and less-developed nations. Developed nations gain from their increased access to consumers and cheaper labor markets in the less developed countries. Developing nations enjoy benefits in the form of increased market access, as well as the ability to import new technologies. At the same time, the vast differences in economic, social and legal structures points to numerous difficulties that will occur, particularly with respect to the health and welfare of individuals in less-developed countries, if international trade is not conducted with a large degree of restraint by developed nations.



The robust regulation of international intellectual property rights serves as a valuable blocking function for savvy, western firms. First and foremost, firms file patents internationally so that they can easily obtain an injunction against foreign suppliers of pirated product. Adherence to the international IP regime by poorer countries largely serves the interests of multinationals by reducing or eliminating the production of pirated or counterfeit products from poorer countries. Eliminating these foreign competitors, who do not need to incorporate huge research and development budgets into their cost structures, provides a legitimate market opportunity for western firms. For example, if Pfizer knows that they do not have to contend with pirated, generic products manufactured in China and sold throughout Asia, they can afford to expend more time and money on long-term goals in the region.

Countries on the verge of the transition from “developing” to “developed” can use their comparatively cheaper labor costs to market increasingly complex and expensive products and services to western markets. If the governments of these under-developed countries take a long-term approach, they can use portions of this economic growth to improve their infrastructure.

Devoting time, money and manpower to better learning the nuances of trade and IP law, would greatly help developing countries balance the scales with developed countries. There are, of course, plenty of NGOs that provide technical assistance to developing countries. A rarely seen doctrine that some developing nation might someday invoke against an inventor from a developed nation is the “reverse doctrine of equivalents.”<sup>197</sup> It provides that a “major improver” of something that has already been assigned a patent is entitled to a property right on the improved item. In essence, there can be two competing sets of property rights on the same object, each potentially generating licensing fees. The crux of the matter is that such rights are not awarded for imitation; significant improvement of an original invention is required.<sup>198</sup>

It is logical to link trade and IP issues, but the comprehensive nature of TRIPS and GATT restricts negotiations and flexibilities that existed under the previous IP regime. While nations should be encouraged to

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197. Mark A Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1008-13 (1997) (discussing the availability of the reverse doctrine of equivalents to a significant improver who is unable to reach a reasonable agreement with the holder of the original patent).

198. *Id.* at 1008-12.

comply with the current trade paradigm, as the Doha Declaration recognizes, provisions that might well lead to adverse effects on healthcare in developing countries should not be mandated without implementing a thorough mechanism to protect affected citizens.

Developed nations must find it within themselves to exercise restraint if TRIPS is to be successfully adopted in the more disadvantaged countries without human suffering.

Admittedly, this runs contrary to all business instincts. Still, until it is clear that trading partners such as China have adapted to some of the harsher realities of capitalism and are looking after their citizens welfare, developed nations must take the high road and provide support when welfare issues occur, rather than maintaining a hard-line trade approach. Developed nations should broadly heed the spirit of the Doha Declaration. The use of trade sanctions and other heavy-handed tools as a means of leveraging concessions from member nations must be restricted to limited circumstances, such as blatant piracy.

In spite of the potential for large-scale trade battles, the United States has not implemented major Section 301 actions towards other nations. China has hardly been an ideal participant in the IP regime, yet it has avoided major sanctions to date. In all likelihood, this is due to the trade strength that China possesses, rather than a conscious effort to provide it breathing room as it adjusts. Nevertheless, there are indications that China is slowly coming about and embracing IP regulations. The number of Chinese patents filed with WIPO in 2004 rose by 38% over those of the previous year.<sup>199</sup> Perhaps the “rampant violations of intellectual property rights”<sup>200</sup> will lessen if economic benefits to China’s economy start to trickle down to a larger subset of its population.

Positive developments in governmental policy, including pharmaceutical responses to the AIDS crisis in under-developed countries and the Doha interpretation of TRIPS provide some small cause for optimism regarding the future of IP rights in international trade. These mostly reactionary responses must be supplemented by an active commitment to incorporate ethics and moral character into trading practices.

Amidst the ongoing U.S. disdain towards internationalism, ceding to the wishes of the international community is politically risky, and is likely to be interpreted as a sign of weakness. Courage, long-range

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199. See Alex Ortolani, *China Moves From Piracy to Patents*, WALL ST. J., Apr. 7, 2005, at B4 (discussing internal pressures from the Chinese government, encouraging Chinese firms to file first, particularly in view of China’s WTO membership and the realities of foreign competition).

200. See Murray Hebert, *China Gets a Passing Grade From Foreign Firms*, WALL ST. J., Nov. 28, 2005, at A11 (investment opportunities have improved, but IP protection remains a problem in China, according to a survey of foreign companies).

vision, and the ability to make decisions contrary to political rhetoric are rare qualities that hopefully will be demonstrated by the leaders of corporate and governmental entities in the developed world.

ALLAN SEGAL

